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Mortgages--Parol Evidence Admitted to Show Defective Acknowledgement of Ostensibly Valid Instrument

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two constitutional provisions guaranteeing as a human right, the privilege against self-incrimination.

The decision of the Ohio court in the instant case is legally sound, logically correct and places the court in accord with the majority view. Nonetheless the wisdom of the decision may be questioned. The decision is essentially based upon the concept of separate and distinct sovereignties. Once having presented this doctrine, the court moves mechanically to its all too logical conclusion. The fiction appears to blind the court to the practical significance of the decision. This is not meant to discredit, generally, the doctrine of separate sovereigns for it is an essential element of our system of law. However, the doctrine does not displace all other reason. The decision of the Michigan Court, previously referred to, makes no reference to the doctrine. The Ohio court did not discuss whether its decision was in keeping with the spirit of the Ohio constitutional provision. No mention was made of the relative position of the privilege in our modern state as compared with its historical significance. If the court feels that the privilege has become an instrument for the protection of communists and criminals this should be revealed. Perhaps, above all else, the court should have made mention of the fairness and justness of the decision, not necessarily to this witness, but to future witnesses who may not be involved in communist activities. When the court is dealing with human rights secured by a constitutional provision, more than mere doctrinal analysis may be reasonably expected.

DAVID P. FREED

MORTGAGES — PAROL EVIDENCE ADMITTED TO SHOW DEFECTIVE ACKNOWLEDGMENT OF OSTENSIBLY VALID INSTRUMENT

An action to marshal liens on certain real property owned by the defendant was brought by the Citizen's National Bank, one of several mortgagees, against Denison, the mortgagor, and the other mortgagees. The mortgages on Denison's property had been recorded in the following order: (1) a mortgage in favor of the plaintiff bank; (2) the mortgage held by the Citizen's Budget Company; (3) another mortgage in favor of the bank, given to refinance the earlier mortgage; and (4) a mortgage held by one Graham. All of the above instruments were obtained without fraud; all were properly recorded; and each, on its face, was valid. However, the method employed in the acknowledgment of the Budget Company's mort-

S. Ct. 497 (1956). It should be noted here that though the Congress has the power to prohibit subsequent state prosecutions by an immunity statute, there is no indication that this is necessary for an immunity statute to be held constitutional. *Hale v. Henkel*, 201 U.S. 43 (1906); *United States v. Murdock*, 284 U.S. 141 (1931).

gage was improper,¹ the mortgagor's husband having acknowledged his signature and that of his wife over the telephone to the notary.²

In this case the court determined that parol evidence should have been admitted to show that an ostensibly valid mortgage was improperly acknowledged, thereby disentitling that instrument to record and making it invalid against the liens of the bank and Graham, the holders of subsequent, properly recorded mortgages.

Ohio courts have consistently held that an improperly executed or acknowledged instrument is not entitled to record and that if the instrument is mistakenly admitted to record, it is to be treated as if it had not been recorded.³ Prior to the instant case, however, this rule had been applied only to those situations in which a defect appeared on the face of the instrument.⁴ Some courts have said, by way of dictum, that if the mortgagee knew or should have known of the falsity of the certificate of the attesting officer, the instrument might be impeached by parol evidence.⁵ But in a case involving the analogous problem of an improperly acknowledged lease, the Ohio Supreme Court held that a second lessee who had "constructive notice" of a prior recorded lease and actual knowledge of an irregularity in its acknowledgment could not have the earlier instrument set aside for a failure to fulfill the statutory requirements for the acknowledgment and attestation of leases.⁶

In the instant case the courts conformed to well-established precedent in holding that a defectively acknowledged instrument is not entitled to record and that if recorded it is not valid and does not afford constructive notice of its existence.⁷ Therefore, it was held that a defective mortgage does not establish a lien with priority over subsequent, properly recorded mortgages. However, the court then stepped beyond the scope of established precedent in holding that this rule applies not only when the instrument is

¹ OHIO REV. CODE § 5301.01 requires that the signature of the mortgagee must be acknowledged before an attesting officer who shall certify the acknowledgment and subscribe his name to the certificate of such acknowledgment.

² *Citizen's National Bank v. Denison*, 165 Ohio St. 89 (1956).

³ 27 OHIO JUR., *Mortgages* § 89 (1933).

⁴ *Amick v. Woodworth*, 58 Ohio St. 86, 50 N.E. 437 (1898); *Strang v. Beach*, 11 Ohio St. 283 (1860); *Erwin v. Shuey*, 8 Ohio St. 509 (1858); *White v. Denman*, 1 Ohio St. 110 (1853).

⁵ *Baldwin v. Snowden*, 11 Ohio St. 203 (1860); 27 OHIO JUR., *Mortgages* § 75 (1933).

⁶ *Logan Gas Co. v. Keith*, 117 Ohio St. 206, 158 N.E. 184 (1927).

⁷ It is to be noted that the recording of mortgages is governed by the provisions of OHIO REV. CODE § 5301.23, not by § 5301.25 as was stated in the *Denison* case. The recording of mortgages has been governed by a separate statutory provision since 1831. However, this error does not seem to have been a determinative factor in the court's decision.

invalid on its face, but also when the defective condition of the conveyance can be shown by external evidence.

It is difficult to perceive any tenable reason in either logic or policy for the court's holding. The court offered little by way of justification. It did point to the fact that a legal obligation rests upon a notary to conform to the statutory requirements for the acknowledgment of mortgages and other conveyances of interests in real property. But to deprive the Budget Company of the priority of its lien over those established by the subsequent mortgages is an uncalled for punishment of the mortgagee for the failure of the notary to adhere to the statutory requirements for acknowledgment and attestation. Had either of the other mortgagees been misled or defrauded by the facts underlying the execution or acknowledgment of the instrument, the result of this case would have been justified and well-grounded on precedent.⁸ But one should note that ostensibly valid mortgages must be admitted to record and that the holders of subsequent mortgages are charged with a duty to inspect the records and consequently with notice of all contained therein. Therefore, both the bank and Graham knew or should have known of the existence of the apparently valid mortgage. As neither was prejudiced by the error in its acknowledgment, there is no justification for their being given this gratuity. The better rule would seem to be that the certificate of an attesting officer should not be impeached in the absence of fraud or deception.

MALCOLM C. DOUGLAS

⁸ *Williamson v. Carskadden*, 36 Ohio St. 664 (1881).